IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

METLAKATLA INDIAN COMMUNITY, ETC. (No. 326)
ORGANIZED VILLAGE OF KAKE, ET AL. (No. 327)

v.

EGAN, GOVERNOR OF ALASKA, ET AL.

On Appeal from the District Court for the District of Alaska

REPLY BRIEF

for Appellants in No. 327, Organized Village of Kake, et al.

Appellee says (p. 27) that Congress never recognized any Indian fishing rights, therefore none existed, therefore none were preserved by the disclaimer in § 4 of the Statehood Act. The amicus, in turn (pp. 6-11, 15-16) threads a narrow path while supporting appellants' prayer for reversal: It says "the United States has not, by treaty or agreement, established permanent homes, *i.e.*, created 'recognized Indian title'—for any of the Alaskan natives," who merely have permissive occupation and not legal rights, so that the disclaimer by Alaska means that Congress may hereafter determine the extent of the rights, if any, to be recognized in these appellants. The ultimate basis for the positions of appellee and the amicus seems to be the two

cases *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86 (1949), and *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272 (1955).

Neither case is apposite. *Hynes* held that while the Secretary of the Interior had established a valid Indian reservation in tideland waters at the Karluk Reservation (337 U. S., pp. 115-116), still the White Act was not a proper basis for the enforcement of criminal sanctions against non-Indian trespassers, pp. 116 *et seq.* *Tee-Hit-Ton* held the United States was not liable under the standing authorization to sue (accorded by § 1505 of the Judicial Code) to pay compensation for taking, pursuant to act of Congress, of the Indian title to lands held by certain Alaskan natives who, like these appellants, are members of the Tlingit group. Neither case held that non-treaty Indians do not have rights. Neither case overruled the long line of authority establishing that rights do exist, to which we now turn:

Appellants Kake and Angoon Have a Property Right In Their Fishing.—Speaking of these appellants, appellee argues (p. 25) that "It is just as impossible to return to the Indians the fishery of Alaska as it is impossible to return to them the State of Kansas, although both were exclusively theirs." But what is to be protected here is what has *not* been lost—and what has not been lost, though perhaps trifling in comparison with what they once had, is clearly a property right.

Even with unrecognized Indian title and without a reservation, these Indians have rights which they have exercised since before the first white man came to Alaska. The small remnant of these rights they seek

here to protect. The fact that they have always been fishermen is recognized not merely by appellee, but is shown by the recent case of *Tlingit and Haida Indians of Alaska* v. *United States*, — C. Cls. —, 177 F. Supp. 452, 456-457 (1959). The aboriginal range of the Kake and the Angoon clans is depicted at page 455 of 177 F. Supp. (see the very center of the map there reproduced). This Court has taken notice of similar historical facts with respect to other Alaskan Indians. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 94-95 and note (1949).[1]

The rights are legal rights, not merely moral ones. From the outset of our national dealings with the Indians, the natives of this country have been "admitted to be the rightful occupants of the soil, with a

---

[1] The basis for these appellants' rights is not limited by this record to the concessions of appellee and historical facts of which the Court will take notice. There is no issue of fact stemming from the assertion in the motions to dismiss below (¶ 2, S.R. 121, 122) that "Plaintiff has no property right in a fish trap location"; for it was based on the legal theory of appellee, accepted below, that the Statehood Act in preserving Indian rights was unconstitutional as impairing Alaska's equal footing, and that the state statutes forbidding exercise of the rights were, in turn, constitutional as applied to Indian fishing—quite apart from whether the Indians had ever had the right. Actually, each complaint to which the motions were addressed had pleaded not only tribal status (¶ I, S.R. 82-83, 102) but had also specifically pleaded (if that were necessary) the fact of Secretarial recognition of the rights of appellants in connection with the regulations promulgated for the 1959 season (¶¶ VI-VII of each complaint, S.R. 84-85, 104-105). The announcement of similar regulations proposed in April, 1960 (commencing p. 32 of our separate Appendix) are similar. If in the light of the presumption of regularity attending such official recognition some denial of the *fact* of the ownership and exercise of the fishing rights by appellants were ventured by appellee, a heavy burden of proof would appear to be cast upon appellee—quite apart from appellee's apparent concessions and the matters of plain history to which we have called attention.

legal as well as just claim to retain possession of it." *Johnson* v. *McIntosh,* 8 Wheat. 543, 574 (1823). "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' **right** of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388-9 (1902). The Court has referred to the Indians' ". . . unquestioned **right** to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17 (1831). Indians have **rights** of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (id., p. 48). They have ". . . a **right** to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States." *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832). Indians hold lands ". . . **owning** them by a perpetual right of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent . . . . their **right** of occupancy is considered as sacred as the fee-simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 745-746 (1835). The Court has spoken of their ". . . unquestionable **right** to the lands they occupy, until . . . extinguished by a voluntary cession . . . This perpetual **right** of occupancy, with the correlative obligation of the government to enforce it . . . ." *Leavenworth Railroad* v. *United States,* 92 U. S. 733, 742 (1875). It has spoken of the ". . . **right** of Indians to their occupancy [which] is as sacred as that of the United States to the fee, . . ." *United States* v. *Cook,* 19 Wall. 591, 593 (1873). It has said that "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian **right** of occupancy . . ." *United States as Guardian, etc.* v. *Santa Fe Pacific*

Railroad Co., 314 U. S. 339, 345 (1941), and *Cramer* v. *United States*, 261 U. S. 219, 227 (1923). "It was the usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States* v. *Alcea Band of Tillamooks*, 329 U. S. 40, 48 (1946).

The legal position of a tribe or (as here) a clan of Indians cannot well be understood without the realization that it constitutes a government—not merely aboriginally, but now—not with only property rights, but with governmental functions recognized by the Indian Reorganization Act (under which these appellants are organized, S.R. 82-83, 102) itself. But the fact that these are political entities, owing, when the white man first came to their country, no allegiance to the United States, has been the Achilles heel of the Indian tribes of this country.

Though their legal rights are plain beyond all cavil, they are governments; the dealings of the federal government with their legal rights is in the political field. No more than could the Russian Government on a trespass by the United States could the Indian tribes come to this country's courts for redress. The Indians could appeal only to the political branch, only to the political conscience of our country. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565-566 (1903).

And when that conscience has heeded the natives' appeal, as has so frequently been the case with the legislative branch of our government (as distinguished from the executive, whose representatives so often have sided with the pioneer in his conflicts with the aborigine), the courts are freed from the political restraint and bound to protect the native's existing rights. While the student may express wonder that the courts call a

violation of "unrecognized" title (as distinguished from land held pursuant to treaty or statute) a mere trespass as distinguished from a taking under the 5th Amendment entitling the aboriginal owner to just compensation,[2] and while the student may wonder why a treaty right may, under § 1505 of the Judicial Code (Appendix, *post*), collect just compensation immediately upon a taking, while the Indian-title right must await still further political permission from Congress,[3] the fact that in any event there is a right fur-

[2] For a *tortious* taking of private property for public use there is no right to just compensation under the Fifth Amendment. *United States* v. *Goltra*, 312 U.S. 203, 208 (1941). But a treaty title of Indians, despite the political bar to suit, gives the right (enforceable when Congress gives permission to sue) to just compensation under the Fifth Amendment. *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); 299 U.S. 476, 495-496 (1937). On the other hand, if the rights involved are aboriginal rights not politically recognized by the United States through treaty or statute—that is, which have not become a contract right of, or a guaranty by the United States to, the Indians, then a taking of title by the United States, and apparently with or without the authorization of Congress, is tortious and does not require just compensation under the Fifth Amendment, *i.e.*, results in a judgment for only the value at time of taking without any damages for delay in making payment. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951). Note that the *Alcea* case cites the *Goltra* case (tortious taking) as authority for this distinction.

[3] A taking of recognized Indian title—the contract right referred to in note 2, just above—is one "arising under or growing out of any treaty, agreement or act of Congress." *United States* v. *Creek Nation*, 295 U.S. 103, 108 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937); *Seminole Nation* v. *United States*, 102 C. Cls. 565 (1944). Therefore it comes under the express language of § 1505 of the Judicial Code (Appendix, *post*); the taking gives a right of immediate action for just compensation. Not so with Indian title which has not been recognized; while it affords the same basis for recovery if Congress waives the political bar and permits suit (first *Alcea—United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946); cf. second *Alcea*,

nishing adequate basis for judicial recognition is left undoubted by the cases.[4] And here that political conscience has heeded the appeal. In Section 4 of the Statehood Act Congress expressly required a disclaimer by Alaska not only of all right and title to property (including fishing rights) held by or for any Indians, but also an agreement that there is retained by the United States absolute jurisdiction and control of that property (including fishing rights). No matter how or when the United States might take the remaining fishing rights of appellants, or how or when or to what extent it might make compensation for their taking, the fact remains that the fisheries is a property right of appellants, and until and unless interfered with by Congress, Alaska is powerless to terminate it.

Respectfully submitted,

JOHN W. CRAGUN,
Counsel for Appellants in No. 327.

FRANCES L. HORN,
WILKINSON, CRAGUN & BARKER,
Of Counsel.

---

above, n. 2) this Court squarely held that a tribe cannot recover for its taking under the language of § 1505 of the Judicial Code. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). While the latter decision is easy enough to understand as relating to a taking not "arising under the Constitution, laws or treaties of the United States," since no treaty guaranteed the right that was taken, still the Court's opinion is not instructive as to why the right is not a claim "which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian trible, band or group," also embraced by that section; for if, as the cases indicate, the bar to suit is the political bar, then an Indian tribe just like any other property-owning corporation might have been thought entitled to sue for its property once that bar has been removed.

[4] First and second *Alcea*, discussed in notes 2 and 3 just above.

APPENDIX

Sec. 1505 of the Judicial Code (28 U.S.C. § 1505) was derived from § 24 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1055), according the first general authority to Indian tribes to sue the United States on such of their claims as might arise after the date of that act. In its present form it was adopted with the Judicial Code of 1949, and reads:

§ 1505. Indian claims

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.